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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-58

OLIVER T. FEIN,

Petitioner,

—v.—

SELECTIVE SERVICE SYSTEM
LOCAL BOARD No. 7, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Dated: October 7, 1971

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PETITIONER'S REPLY BRIEF

I.

Preliminarily we note the recent amendment by Congress of the Selective Service Act of 1967. By this amendment, particularly §22 entitled "Procedural Rights," Congress has explicitly recognized that registrants are entitled to a fair hearing by the appeal board consistent with the requirements of procedural due process.

The preamble to §22 expressly confirms this, and what we stated in Point II of our principal brief; namely, that it was and is the intention of Congress to "guarantee to each registrant asserting a claim before a local or appeal board,

a fair hearing consistent with the informal and expeditious processing which is required by selective service cases." Pursuant to §22 the President is authorized to adopt regulations implementing specific procedural rights, among which are the following:

> "(1) Each registrant shall be afforded the opportunity to appear in person before the local or appeal board of the Selective Service System to testify and present evidence regarding his status.
>
> • • • • •
>
> "(4) In the event of a decision adverse to the claim of a registrant, the local or appeal board making such decision shall, upon request, furnish to such registrant a brief written statement of the reasons for its decision."

These provisions make clear that the summary appeal process to which petitioner was subjected was not consistent with the underlying, albeit implicit principles of fairness that were intended by Congress to govern prior to the 1971 amendments. The applicability to petitioner of the 1971 amendments presents a simple and direct claim of statutory right for which preinduction judicial review is unquestionably available. For if these amendments are applicable, it must be found that the summary process employed by the appeal board contravened an unambiguous mandate of the Selective Service Act, as did the actions of the boards in *Oestereich* v. *Selective Service*, 393 U.S. 233; *Breen* v. *Selective Service*, 396 U.S. 460.

II.

Respondents urge affirmance principally on the basis of *Clark* v. *Gabriel*, 393 U.S. 256. There the Court held that §10(b)(3) of the Selective Service Act of 1967 precludes preinduction judicial review "of the classification or processing of any registrant" in, as respondents state, "the generality of situations where the local and appeal boards have applied their judgment and exercised their discretion" (Res. Br. p. 23).[1] But this case, by respondents' own admissions, involves review of neither the "classification or processing" of petitioner in the Selective Service System, nor the discretionary action of any of its officials.

Respondents concede at the outset of their brief that unlike *Gabriel*, "this Court is not now called upon to determine whether petitioner's assigned classification is wholly without factual basis" (Res. Br. p. 13). Plainly, as respondents recognize (Res. Br. pp. 13, 56 n. 45), petitioner's challenge on procedural due process grounds does not call for judicial review of any judgmental or discretionary act by Selective Service officials in determining petitioner's classification or the manner in which he will be processed for induction. Compare *Gregory* v. *Tarr*, 436 F.2d 513 (6th Cir. 1971); see also Mr. Justice Harlan's concurring opinion in *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 240-242. The summary process employed by respondents in revoking petitioner's conscientious objector status is challenged in this suit as being facially invalid under the Due Process Clause of the Fifth Amendment. Since that process was clearly dictated by the governing regulatory,

[1] "Res. Br." references are to the Brief for the Respondents.

if not statutory, provision, no discretionary acts on respondents' part are involved.[2]

Respondents also acknowledge that the procedures challenged by petitioner as depriving him of a "fair and just"[3] administrative appeal are "like the classification procedures questioned in *Oestereich* and *Breen* . . ." (Res. Br. p. 34). Respondents labor in an attempt to distinguish *Oestereich* and *Breen* from this case, but only succeed in raising distinctions of a wholly technical, if not unreal, nature. Respondents completely fail to make the crucial demonstration, namely that there is some valid reason why

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[2] While we agree with decisions such as *Hunt* v. *Local Board*, 438 F.2d 1128 (3rd Cir. 1971), we have not, contrary to respondents' view (Res. Br. p. 28 n. 23), based our case on such decisions. Cases such as *Hunt*, involve review of discretionary judgments by local and appeal boards, and are therefore fundamentally distinct from this case.

Nor are the decisions in *Gregory* v. *Tarr*, *supra*, and *Evans* v. *Local Board*, 425 F.2d 323 (10th Cir. 1970), upon which respondents rely (Res. Br. p. 28 n. 22), contrary to our position. Preinduction review in both *Gregory* and *Evans* was denied after the courts found that the boards had been delegated discretion in determining the substantive criteria to be applied to the respective claims for III-A and II-S deferments and had exercised that discretion within the statutory authorization. Once having determined that the registrants' attack in court was directed exclusively at the propriety of the boards' exercise of discretion, the courts concluded that §10(b)(3) barred further review on the issue of abuse of discretion. Respondents concede in our case that petitioner's challenge is directed exclusively to the procedural fairness of the appeal process and therefore in no way calls upon this or any court to engage in a preinduction review of any act of discretion or judgment by the appeal board.

[3] The summary revocation of petitioner's conscientious objector status deprived petitioner of fundamental procedural rights guaranteed by the Due Process Clause of the Fifth Amendment and it also conflicts with the explicit Congressional command that the system of military selection be "fair and just." See §1(c) of the Selective Service Act of 1967, 50 U.S.C. App. §451(c).

§10(b)(3) should be read to permit preinduction review in *Oestereich* and *Breen* and to preclude such review here.

Indeed, in light of the Congressional purposes behind §10(b)(3) petitioner presents a far more compelling case for preinduction judicial review than did either *Oestereich* or *Breen*. Two concerns prompted the enactment of §10(b)(3): (i) the "inclination of the courts to prematurely inquire into the classification action of local boards" before registrants have exhausted their administrative remedies; and (ii) the possibility for "litigious interruptions" of the military selection process resulting from preinduction judicial review of discretionary decisions by Selective Service officials. See footnote 5, *infra*. In both *Oestereich* and *Breen* the Court concluded that despite these Congressional concerns §10(b)(3) should not be applied to preclude a preinduction claim by a registrant that he was reclassified I-A on the basis of substantive criteria which were not authorized by statute, or, if so authorized, were in violation of the First and Fifth Amendments. Such a

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[4] H. Rep. No. 267, 90th Cong., 1st Sess. 30-31; see also S. Rep. No. 209, 90th Cong., 1st Sess. 10. As these reports point out, Congress sought to reiterate the rule established in *Falbo* v. *United States*, 320 U.S. 549 as interpreted in *Estep* v. *United States*, 327 U.S. 114. That rule is not a superficial one of timing, as respondents claim (Res. Br. p. 14), but rather is one of exhaustion of administrative remedies. See *McKart* v. *United States*, 395 U.S. 199, 202-203. Here petitioner has exhausted all his administrative remedies and therefore his action for preinduction review is not in any sense premature. All that is involved in this case is whether petitioner must undergo criminal prosecution or relinquish his liberty by submitting to induction so that he can establish in court that he was denied procedural due process by the appeal board. Petitioner's challenge is fixed and unavoidable; respondents offer no reason why judicial review the day before induction is inappropriate and why such review the day after when petitioner is a conscripted conscientious objector or more likely a criminal defendant is required by §10(b)(3).

claim does not require exhaustion of administrative remedies (Cf. *McKart* v. *United States, supra* at 202). Nor, does its resolution entail review of the board's exercise of discretion and therefore does not pose the danger of "litigious interruption" against which §10(b)(3) was directed.

Petitioner's challenge is more fundamental than those presented in *Oestereich* and *Breen*; it goes to the very integrity of the decision-making process at the appeal stage of the Selective Service System. The challenge here is that the basic administrative procedures did not provide rudimentary fairness. A process which culminates in an individual's loss of substantial liberty, as the Selective Service appeal process surely must in this case, should at the very least provide for notice of issues, an opportunity to submit a written response, and, in cases where the decision is adverse to the individual's position, a statement of the reasons for that decision.

Although petitioner has in fact exhausted his administrative remedies, the inherent unfairness of these remedies makes exhaustion unnecessary since his procedural due process claims are not within the special competence and expertise of the administrative boards to adjudicate. (See *McKart* v. *United States, supra* at 193-194, 198; *Oestereich* v. *Selective Service, supra* at 242; *Unglesby* v. *Zimmy*, 250 F. Supp. 714, 717 (N.D. Cal. 1965), and, in the absence of minimal procedural safeguards, his substantive claim for conscientious objector status would not be fairly or fully considered. Thus the principal purpose behind §10(b)(3), to ensure exhaustion of administrative remedies is not applicable to this case. In analogous cases, where, as here, Congressional concern is manifested for the autonomy, finality and uninterrupted process of administrative agency

proceedings, judicial relief in advance of completion of the administrative process has always been available to review procedural due process claims, whose nature is such that, as Chief Justice (then Circuit Judge) Burger ruled,

> "on its face the contemplated hearing or other administrative process, if consummated, would be set aside on review on procedural grounds." *Wolf Corporation* v. *SEC*, 317 F.2d 139, 143 (D.C. Cir. 1963).

Moreover, as respondents concede, no discretionary[5] decision is called into question here, and, therefore, as in *Oestereich* and *Breen*, no danger of litigious interruption is present.[6]

The "lawlessness" that inheres in the appeal board's summary revocation of petitioner's conscientious objector

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[5] This Court, as well as the lower federal courts, have consistently refused to apply the doctrine of administrative exhaustion, where the deficiencies in the administrative remedies are of a fundamental procedural nature, as they are in this case. See *Meyers* v. *Bethlehem Corp.*, 303 U.S. 41, 48-50; *NLRB* v. *Marine Workers*, 391 U.S. 418, 426 and n. 8; *Rosado* v. *Wyman*, 397 U.S. 397, 406-407; *Reed* v. *Franke*, 297 F.2d 17, 20-21 (4th Cir. 1961); *Unglesby* v. *Zimny*, 250 F. Supp. 714, 717 (N.D. Cal. 1965); 3K. Davis, *Administrative Law Treatise* §20.07 (1958).

[6] If there has been "litigious interruption" in this case, in the sense that petitioner's claim of right still awaits resolution, it is entirely due to respondents' interposition of the §10(b)(3) bar to judicial review. Clearly, had the district court been permitted to reach the merits, the due process issues presented here would have been settled long ago, in far less time and with far less of a burden on the judicial process than if the issues had been adjudicated in the course of a criminal prosecution. Moreover, it is difficult to understand how the induction process may have been interrupted by this litigation, as respondents contend (Res. Br. p. 56 n. 45), where that process has been voluntarily stayed by respondents themselves, who have found it unnecessary to issue a new induction order until this action has been decided.

status is clearly of a more fundamental character than that involved in *Oestereich* and *Breen*. In the absence of procedural safeguards, particularly the right to a statement of reasons, no one, neither the petitioner nor the Court, can determine even whether petitioner, like *Oestereich* and *Breen*, was reclassified on the basis of extraneous substantive criteria, specifically, in this case, petitioner's lawful association with the Students for a Democratic Society.

The summary procedures followed by the appeal board prevented petitioner from adequately presenting his side in support of his conscientious objector status and therefore rendered the administrative record inherently and constitutionally insufficient as a basis for judicial review on the substantive merits of his 1-A classification. This respondents concede.[7] Essentially, petitioner commenced this action to secure the opportunity to make a full administrative record in support of his conscientious objector status.

Respondents offer no explanation, in terms of the practicalities involved in the administration of the Selective Service System, as to why petitioner, unlike *Oestereich* and *Breen*, must undertake the risks and burdens of criminal prosecution or forego his liberty and his religious and moral scruples in order to obtain a judicial determination that the appeal board must abide by fundamentally fair procedures in reviewing his qualifications for conscientious objector status. Surely no one would suggest that §10(b)(3) serves a legitimate interest in making judicial review

[7] Respondents state: "Even if he [petitioner] were ultimately to prevail in the instant suit, it cannot be determined on this record whether he is entitled to an exemption from military service" (Res. Br. p. 56 n. 45).

so costly that many registrants are coerced into acquiescing in the System's procedural violations.[8]

Respondents' brief is also silent when it comes to the question of whether any institutional interests are served at all by barring preinduction judicial review in this case. In fact, allowing such review would greatly serve the interest of both the efficient functioning of the induction and military training processes and the conservation of judicial resources. Because of the inherent insufficiency of the administrative record (Res. Br. p. 56, n. 45), the relief petitioner seeks (or would seek at any time) is an order remanding the case to the Appeal Board with directions that it abide by fair procedures. To require a criminal prosecution in order to obtain such relief is plainly a costly and inefficient method of proceeding. This is especially true where a single preinduction suit can expeditiously

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[8] See also, *Ex Parte Fabiani*, 105 F. Supp. 139 (E.D. Pa. 1952); *Estep* v. *United States*, 327 U.S. 114 (Mr. Justice Murphy concurring).

Similarly, as the Solicitor General pointed out in his brief in *Oestereich*, pp. 60-61:

> "It is *possible* to have review only through criminal prosecution, or through habeas corpus, and to have the ministerial exemption recognized at that point. But there are difficulties. After a draft board issued a notice of induction, a registrant is surely in peril if he refuses to comply with it, and he may find himself effectively in the service, if he does comply with it. It might be claimed that he had waived his exemption by responding affirmatively to induction [see *Gibson* v. *United States*, 329 U.S. 338 (1946)], and he may be held not to have exhausted his administrative remedies if he refuses to accept induction. See *Falbo* v. *United States*, 320 U.S. 549, 553. Moreover, he does not have an opportunity to find out in advance whether he is wrong, and to decide then whether to take the penalty or to accept the legal conclusion as to his status. He must take the risk in order to find out whether he is subject to a penalty."

resolve the procedural issues in petitioner's case, as well as in the cases of all those registrants similarly situated. A preinduction suit also avoids disruption of the military training program and the serious possibility that an inductee claiming unlawful deprivation of his conscientious objector status would be placed in a situation of having to disobey a military order which he deems violative of his religious and moral scruples.[9] Finally, preinduction review of procedural challenges would permit the speedy return of the registrant to the selective service for reprocessing.[10] This would eliminate the possibility that a registrant can avoid his military obligations altogether by raising his procedural challenge in a post induction proceeding, thereby delaying resolution of that challenge until after his 26th birthday.

Basically, respondents claim that the rule established by *Oestereich* and *Breen* applies only to cases where "(1) The registrant fully qualified for a statutory exemption

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[9] See *Noyd* v. *Bond*, 89 S. Ct. 478.

Significantly, no assurance is given under military regulations that inductees who claim in a habeas corpus proceeding the illegality of their 1-A classification and that they are entitled to conscientious objector status will be permitted to abstain from military training exercises and duties. Compare DoD No. 1300.6 §VI(B) (May 10, 1968); and see *Ehlert* v. *United States*, 402 U.S. 99, 106 n. 9.

[10] This was the course followed in *Wiener* v. *Local Board No. 4*, 302 F. Supp. 266 (D. Del. 1969). The registrant in that case raised a due process procedural challenge to the appeal process, identical to that raised here by petitioner. After holding that the suit was not barred by §10(b)(3), the court ruled that the summary process violated the Due Process Clause of the Fifth Amendment and remanded the case to the appeal board with orders that it proceed consistent with the court's decision. No appeal was taken by the Government from that ruling. No reason appears for the Government's adherence to a different policy in this case with respect to the applicability of §10(b)(3) to due process procedural claims.

[or deferment] . . . (2) the [board revoked] that exemption [or deferment] by a delinquency classification [or on the basis of some other substantive ground not authorized by statute].[11] (3) The challenged local board action had concededly been based on behavior by the registrant completely extraneous to the board's evaluation of the claimed exemption [or deferment]." (Res. Br. p. 21). It should immediately be noted that the third factor respondents list is merely the particular impropriety involved in *Oestereich* and *Breen* and is not involved in the I-S cases. Moreover, listing separately the third factor reflects the confusion manifest throughout respondents' argument between the nature of a preinduction claim that is not barred by §10(b)(3) and the question of whether the registrant can establish the substance of such a claim upon a hearing on the merits.[12] Finally, respondents neglect to list a fourth factor on which they rely in attempting to differentiate this case from *Oestereich* and *Breen* (Res. Br. p. 36): that the denial of preinduction review "clashes" with another provision of the Act *or* is unnecessarily harsh.

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[11] This would include the unauthorized action of local boards to refuse I-S student deferments in cases like *Carey* v. *Local Board*, 297 F. Supp. 252 (D. Conn.), aff'd, 412 F.2d 71 (C.A. 2). See Res. Br. p. 27.

[12] A clear example is respondents' discussion of *Swift* v. *Director of Selective Service*, 3 S.S.L.R. 3839 (D.C. Cir. 1971) (Res. Br. p. 29 n. 23). While, contrary to respondents' claim, we did not rely on *Swift*, it should be noted that the second *Swift* decision, after *Ehlert* v. *United States*, 402 U.S. 99, did not disavow the earlier position taken by the court, but merely recognized that *Ehlert* eliminated the registrants' claim and the basis for preinduction review.

Similarly in *Stella* v. *Selective Service*, 427 F.2d 887 (2d Cir. 1970), the court intimated no view of the propriety of preinduction review of the registrant's claim, but concluded under the facts that the registrant, in effect, had no standing to raise the claim.

Again in *Green* v. *Selective Service Board*, 419 F.2d 813 (8th Cir. 1969), the court concluded that administrative discretion was

There is no indication, however, in either *Oestereich* or *Breen* that they be read as narrowly as respondents contend. On the contrary, in those cases the Court spoke in broad terms authorizing preinduction judicial review whenever a board's action is "blatantly lawless." Surely, as *Oestereich* makes clear, lawless action includes that action which violates constitutional, as well as statutory, commands. Thus, the Court noted the serious constitutional attack raised against the delinquency provisions in *Oestereich*, but found it unnecessary to decide that issue because the delinquency reclassification constituted a "clear departure by the Board from its statutory mandate." *Oestereich* v. *Selective Service Board, supra* at 238; *Breen* v. *Selective Service Board, supra* at 467. It would demean the registrant's constitutional right to procedural due process to say that judicial redress for its violation will not be as swift and sure as that provided when the board reclassifies on the basis of substantive criteria that is not authorized by statute.

In contrast to respondents' present interpretation is the Solicitor General's argument in *Oestereich* (Brief, p. 14) that §10(b)(3) should be construed in a manner consistent with the well established line of cases holding that judicial

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involved in the establishment of an order of call, and therefore §10(b)(3) was a bar. See also the cases relied on by respondents involving preinduction review of a board's refusal to reopen (Res. Br. pp. 28-29).

It is significant that in these decisions the courts did not find it necessary that the registrant be unquestionably qualified for the status he sought. Moreover, as these cases indicate, the courts must preliminarily determine that there is merit to a claim of blatant lawlessness. But there is no requirement that the claim be established beyond question, as respondents would have it, as a predicate for the court to exercise jurisdiction.

review is available to check an administrator who acts in *excess* of his statutory authority. With respect to §10(b)(3), the Solicitor General pointed out, "that there is room for an appropriate distinction between an order which is contrary to the terms of a statute and an order which is challenged only on the ground that the Board has misapplied or abused its authority in making its judgment." Cf. *Harmon* v. *Brucker*, 355 U.S. 579, 581-582; *Leedom v. Kyne*, 358 U.S. 184, 188. *Harmon* relied on *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 159, 160, where a principal claim was that the summary administrative procedure violated the constitutional right to procedural due process, or was not authorized by governing statutes. Preinduction review is certainly appropriate in this case, where no act of discretion was involved, and where the appeal board's procedures and the state director's authority to appeal are challenged as violative of constitutional and/or statutory commands.

Furthermore, petitioner's challenge fully satisfies even respondent's narrow formulation of the *Oestereich, Breen* rule.

First, petitioner's grant of conscientious objector status by his local board is deemed "final" and unconvertible unless "an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe." 50 U.S.C. §460(b)(3). Petitioner therefore has a clear, statutory right to his conscientious objector status, as did *Oestereich* and *Breen* to their exemptions and deferments. The classification status in each case was revocable, at all times, but only where the revocation was undertaken in accordance with constitutionally valid and statu-

torily authorized procedures. In this case, as in *Oestereich* and *Breen*, the challenge is directed exclusively to the validity and authorization of those procedures.

Second, as in *Oestereich* and *Breen*, petitioner's claim that the procedures by which his conscientious objector status was revoked, including the absence of a fair hearing and authority of the State Director to initiate an appeal in these circumstances, is essentially a claim that the respondents exceeded their statutory and constitutional authority.

Third, the procedures challenged here, as in *Oestereich* and *Breen*, are in no way related to the factual and discretionary considerations involved in the appeal board's evaluation of petitioner's entitlement to his conscientious objector classification. Essentially, petitioner challenges the predicate for that evaluation; namely, the procedures governing the fact-finding and decision-making function of the board. Therefore his claim is separate and apart from the board's evaluative functions, far more so than were the claims in *Oestereich* and *Breen* that the board's evaluation involved extraneous information.

Fourth, respondents make a basic error in assuming that preinduction judicial review is authorized only in situations where the enforcement of §10(b)(3) would "clash" with the statutory command that exempt and deferred registrants shall not be subjected to military training and service. Clearly, since Oestereich and Breen always had the option of refusing induction, it cannot be said that the "clash" between the requirements of §10(b)(3) and the Act's other mandates was unavoidable. In fact, the Court in *Oestereich* and *Breen* made it clear that where no "clash" exists, as in

the case of a registrant who refuses induction, preinduction judicial review is still available. Thus, the Court ruled that to compel registrants whose exempt or deferred status was revoked under plainly illegal procedures to raise that illegality as a defense in a criminal prosecution would be "to construe the Act with unnecessary harshness." 393 U.S. at 238.

If §10(b)(3) is enforced here and petitioner is compelled to submit to induction in order to raise his claims that his conscientious objector status was revoked without procedural due process, such an application of §10(b)(3) will not only "clash" with various statutory mandates, that petitioner "shall . . . not be subject to combatant training and service" [50 U.S.C. §456(i)], that his local board's grant of conscientious objector status is "final" unless revoked under authorized procedures [50 U.S.C. §460(b)(3)], and that he be treated in a fashion that is "fair and just" [50 U.S.C. §451(c)], but that application also will "clash" with the implied (now express under the 1971 amendment) statutory "policy to afford meticulous procedural protections to applicants who claim to be conscientious objectors . . ." *United States* v. *Gearey*, 368 F.2d 144, 150 (2d Cir. 1966); and the requirement "of procedural regularity and basic fair play." *Gonzales* v. *United States*, 248 U.S. 407, 412. Moreover, such an application of §10(b)(3) will "clash" with the mandate of the Fifth Amendment that no person shall be subject to a loss of liberty without due process of law.[18]

[18] Respondents argue that petitioner's induction will not necessarily clash with other statutory provisions since he is merely vouchsafed from "combatant training and service." This statutory protection is by no means as minor as respondents imply. It represents a Congressional recognition of petitioner's deeply held religious

Alternatively, it would be to construe §10(b)(3) with "unnecessary harshness" if it were read to force petitioner to refuse induction and subject himself to criminal prosecution in order to protect his due process rights. Cf. *Hammond* v. *Lenfest*, 398 F.2d 705, 714 (2d Cir. 1968). Nothing is gained by such an application of §10(b)(3), and as we have shown much is lost in terms of the judicial time and energy expended in such cases and the disruption caused to the military selection and training process.

Respondents make an extended effort to discredit a series of decisions in the Eighth Circuit, which involve the application of regulations governing the induction processing machinery, and the *Hunt* decision of the Third Circuit (Res. Br. pp. 28, 30). But those decisions, however correct or incorrect, are totally unrelated to this case. First, the challenge here does not involve mere "processing" procedures, but rather constitutional procedures, the absence of which undermines the very integrity and credibility of the board's decision-making function. Second, *Hunt* involved review of a board's exercise of its judgmental powers; respondents concede that no such review is involved in this case.

Respondents' efforts with respect to these completely irrelevant cases places in relief their total failure to dis-

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principles which do not permit him to engage in "combatant training and service." While other registrants may be spared *all* training and service, it should be remembered that most of these registrants are merely deferred and will at some later date become fully liable for induction. Moreover, it is evidence of the importance Congress has attached to C.O. deferment that unlike many other deferments, Congress has steadfastly refused to limit or eliminate the rights of C.O.'s to be relieved of combatant training and service.

cuss cases on which petitioner relies, in which were raised procedural due process challenges almost identical to those presented here, and in which preinduction judicial review was authorized. See *Weiner* v. *Local Board,* 302 F. Supp. 266 (D. Del. 1969) (preinduction review of a registrant's claim that the failure to be apprised of the basis for the appeal by the State Director from the local board's classification deprived him of adequate notice and a fair hearing before the appeal board); *Slettehaugh* v. *Tarr,* 322 F. Supp. 180 (D. Minn. 1971) (preinduction review of a claim that the summary treatment of his appeal by the appeal board deprived him of a "meaningful, thoughtful review" to which he was entitled under principles of due process); *Murray* v. *Blatchford,* 307 F. Supp. 1038 (D.R.I. 1969) (preinduction review, in part, directed at the failure to advise the registrant and permit rebuttal of certain adverse information in his file); and *Bengoechea* v. *Micheli,* 295 F. Supp. 257 (D.P.R. 1969) (same). To our knowledge none of these cases has been appealed by the Government, which in effect is recognition of the validity of those rulings.

More recently in *Kendall* v. *Selective Service,* —— F. Supp. —— (N.D. Cal. 1971) (Case No. C-17 499 ACW), —— SSLR —— it was held that the failure of a local board to give reasons for revoking a registrant's conscientious objector status upon a petition for reconsideration by the State Director raised a procedural due process claim that meets the "degree of 'lawlessness' which *Oestereich* and other cases require for preinduction review." Such a claim, in the court's view, could be resolved expeditiously (as it actually was) because the court "need reexamine no finding of fact by the board, and need weigh

no evidence." See also *Haggerty* v. *Selective Service*, 325 F. Supp. 69, 72 (W.D. Pa. 1971).

Respondents make no relevant reply to these cases. Their argument is that, on the merits, petitioner has not *clearly* been denied procedural due process by the appeal board's summary revocation of his conscientious objector status. That argument is without foundation in light of the rudimentary nature of the procedural rights petitioner was denied. But, respondents' basic error is in their approach. It blinks reality to argue, as they have, that because a registrant has not proven beyond a reasonable doubt that each and every procedural violation he claims will be sustained he should not be permitted to invoke a court's jurisdiction to review. Certainly, petitioner's claims are presumptively valid especially in light of this Court's recent decisions in *Bell* v. *Burson*, 402 U.S. 535; *Goldberg* v. *Kelly*, 397 U.S. 254; *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337; *Wisconsin* v. *Constantineau*, 400 U.S. 433, and the manifest concern of the Court that registrants, particularly those claiming conscientious objector status, should be afforded a fair and full opportunity to present their case to the appeal board. See *Mulloy* v. *United States*, 398 U.S. 410, 416; *Gonzales* v. *United States*, *supra*; *Simmons* v. *United States*, 348 U.S. 397.[14]

[14] Respondents misstate petitioner's procedural claims. Petitioner seeks to establish the right to notice of the issues by the appeal board. Therefore it does not matter that the State Director has stated no reasons for his appeal. Moreover, petitioner is entitled to a statement of reasons whether or not the appeal board believes that there is a *prima facie* case. Certainly, there can be no claim of undue burden for the board to state what simple facts, if any, in petitioner's application and file detract from his *prima facie* showing. Thus there is no need for a court to review any discretionary act by the board to determine a registrant's right to a statement of reasons.

Moreover, respondents do not (and after the 1971 Amendments can not) argue that affording petitioner the procedural safeguards he requests would disrupt the appeal process or would be inappropriate because of some overriding consideration.

III.

There is no substance to respondents' claim that this action is no longer ripe for adjudication because petitioner's cancelled induction order has not yet been reissued (Res. Br. p. 32). No contention is made that petitioner is no longer liable for induction. In fact, as a doctor, petitioner is specifically characterized as an extended liability registrant, and eligible for induction until the age of 35. Nor do respondents indicate any change on the part of the appeal board in terms of its view that petitioner is not qualified for conscientious objector status. As things stand petitioner has been classified I-A on the basis of the appeal board's decision, which he claims was unfairly made; he is thereby subject to an order of induction at any time respondents in their sole and exclusive discretion may decide to issue it.

The ripeness doctrine is designed to prevent courts

> "through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court con-

sideration." *Abbot Laboratories, Inc.* v. *Gardner,* 387 U.S. 136, 148-149.

Clearly, the facts of this case demonstrate that the parties to this dispute stand in adverse position to one another, that the legal dispute is unavoidable and concretely presented, and that the injury petitioner seeks to avoid is of such a grave nature that the absence of any barriers to its imposition has a substantial impact on petitioner's daily activities and future plans. In no sense, then, can petitioner's claim of right be considered hypothetical or premature. See K. Davis, *Administrative Law Treatise,* §21.01 *et seq.* (1970 Supp.).

It should be noted that the petitioners in *Breen* v. *Selective Service, supra* and in *Anderson* v. *Hershey,* 397 U.S. 47 and *Osher* v. *Selective Service,* 397 U.S. 47, did not have outstanding induction notices at the time their cases were heard by the lower courts or by this Court. Moreover, in none of those cases, in contrast to this case, had the registrants received any prior induction order.

Based on the circumstances of this case, petitioner has every reason to believe that at the termination of this action, or perhaps even before, a new induction order will issue. It serves no valid purpose to dismiss this case now and compel petitioner to relitigate these issues under the time and emotional pressures created by a new induction order.

Finally, to understand the plight of a selective service registrant who will be living for years under the constant threat of respondents' acting upon his I-A classification by ordering him for induction—uprooting him from his civilian life, his family, and his professional work—is clearly to understand the ripeness of petitioner's case.

CONCLUSION

For the reasons stated above, the judgment below should be reversed with instructions to the Court of Appeals that it direct the District Court to enter an order restoring petitioner to his conscientious objector status pending compliance by the Selective Service Appeal Board with the requirements of procedural due process.

Respectfully submitted,

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Dated: October 7, 1971